

Klarfeld, Joshua

From: Klarfeld, Joshua
Sent: Wednesday, May 06, 2015 9:27 AM
To: 'Schramek, Adam T.'
Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Adam,

Without conceding the accuracy of anything stated in your email below, it appears you do not appreciate that Mr. Higgins has legitimate Fifth Amendment concerns and, therefore, that he will invoke his Fifth Amendment privilege as to each and every substantive question posed. This is curious because the assertions contained your email below highlights at least a portion of the basis for those concerns. If your clients are not willing to accept a deposition on written questions – and it appears from your email that they are not – upon service on me of a deposition subpoena we will file a motion and seek protection from the Court.

Joshua

Joshua A. Klarfeld
Ulmer & Berne LLP
216.583.7192

From: Schramek, Adam T. [mailto:adam.schramek@nortonrosefulbright.com]
Sent: Tuesday, May 05, 2015 6:26 PM
To: Klarfeld, Joshua
Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Based on the documents, Mr. Higgins is a long-time employee of GDC who is intimately familiar with the property at which the MPA was compounded, including the history of work performed by Liberty (cleanroom installer) and Victory (HVAC), the problems with such work, maintenance and repair history of the facility, the recycling center operations, and a host of other matters that are highly relevant to the Saint Thomas Entities' comparative fault claims against NECC, GDC, Ameridose, Liberty and Victory.

Mr. Higgins used not only a GDC e-mail address, but also MSM and Conigliaro addresses. He is listed as Victory's contact for NECC on invoices, provided design input to Liberty on the Ameridose cleanrooms at issue, generated the punch list for them, and maintained the "operating and maintenance" manuals for them.

With respect to GDC, it has been sued for causing or contributing to the contamination of the steroid injections at issue. GDC has contributed (directly or through its owners) millions of dollars to resolve that liability. Mr. Higgins is a key fact witness. Regardless of whether he was management level at GDC or not (which appears debatable), his actions as GDC's employee, acting by and for it in the normal course and scope of his employment, bind GDC. For all intents and purposes, he was the property manager.

Given the fact he is a key fact witness to the matters at issue in the comparative fault claim against GDC and numerous other parties and nonparties (this being a very brief recitation of some of his connections to the claims and parties), we see no meaningful alternative to conducting a deposition.

Thanks,

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From: Klarfeld, Joshua [<mailto:jklarfeld@ulmer.com>]
Sent: Tuesday, May 05, 2015 4:12 PM
To: Schramek, Adam T.
Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Thank you Adam. Just so we're clear, and so I can reference it in the motion for protective order/motion to quash, am I correct that your clients will not consider any alternative other than an oral deposition of Mr. Higgins, who is a non-party?

Joshua

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From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]
Sent: Tuesday, May 05, 2015 4:59 PM
To: Klarfeld, Joshua
Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Joshua:

We will send you a subpoena and so long as you move for protection by Monday 5/11 (meaning our response will be due prior to the next status and Judge Boal will have time to review it), we will work with you to schedule a new date if the Court, as we believe it should, denies your motion.

Thanks,

Adam T. Schramek | Partner
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From: Klarfeld, Joshua [<mailto:jklarfeld@ulmer.com>]
Sent: Tuesday, May 05, 2015 2:26 PM
To: Schramek, Adam T.
Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Adam,

As the footnote in GDC's motion indicated, Mr. Higgins intends to invoke the Fifth Amendment in response to any substantive question posed to him at any deposition. If subpoenaed, he intends to file a motion for protective order/motion to quash along the same lines as the Invoking Defendants did in MDL Doc. No. 1823. In light of that, we would request the St. Thomas entities hold off on issuing a subpoena to Mr. Higgins until the Court has ruled on the pending motions for protective order/motions to quash. Once the Court rules on those motions, it should give the parties guidance as to whether a deposition of Mr. Higgins would be permitted, and it may obviate the need for further motion practice.

Leaving aside the timing of the subpoena, would your clients consider having Mr. Higgins' deposition conducted by written questions under Rule 31 of the Federal Rules of Civil Procedure as an alternative to an oral deposition? That would be a less intrusive manner of conducting the deposition of this non-party who intends to invoke the Fifth Amendment should the Court require such a deposition, and it would be more appropriate under the circumstances. If that is something your clients would consider, I will propose it to Mr. Higgins as a possible path forward to avoid motion practice.

With respect to a deposition date, I am reluctant to propose a specific date out of a concern that you may attempt to construe offering such a date as a consent to the deposition. However, if your intention is to use a specific date only as a placeholder to finalize the subpoena and ripen the issue for a motion, and if you will agree that there is no expectation that Mr. Higgins will appear for a deposition while we brief the motion for protective order/motion to quash, I will work with him to propose a place-holder date.

Finally, a deposition notice will not suffice. Regardless of whether the Court were to require Mr. Higgins to appear for a deposition, and regardless of the manner in which his deposition would be taken, Mr. Higgins would not be testifying on behalf of GDC. If called to testify, and if required by the Court to appear, Mr. Higgins would be sitting only in his individual capacity. Accordingly, a subpoena will be necessary. That said, I am authorized to accept the subpoena on his behalf, so when you are ready to serve the subpoena please send it to my attention.

If you would like to set up a phone call to discuss these issues, please let me know.

Joshua

Joshua A. Klarfeld
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From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]
Sent: Tuesday, May 05, 2015 12:24 PM

To: Klarfeld, Joshua

Cc: Thomas, Joseph; Puig, Yvonne K.; Hoffman, Eric; 'SKelly@nutter.com' (SKelly@nutter.com)

Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Joshua:

I just read your footnote regarding Mr. Higgins. Please provide me a date he is available so I can formalize our request. Given the fact he is a current employee, can we agree that a deposition notice is sufficient?

Thanks,

Adam T. Schramek | Partner

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From: Schramek, Adam T.

Sent: Friday, May 01, 2015 12:22 PM

To: 'Klarfeld, Joshua'

Cc: Thomas, Joseph

Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Thanks Joshua. Could you please find out his availability for a deposition prior to June 15?

Adam

From: Klarfeld, Joshua [<mailto:jklarfeld@ulmer.com>]

Sent: Friday, May 01, 2015 12:13 PM

To: Schramek, Adam T.

Cc: Thomas, Joseph

Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Adam,

Steve Higgins is still employed by GDC. Please do not contact him other than through counsel.

Have a good weekend,

Joshua

Joshua A. Klarfeld

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216.583.7192

From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]
Sent: Tuesday, April 28, 2015 3:13 PM
To: Klarfeld, Joshua
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Thanks for the e-mail. I think the corporate rep deposition issue is covered by our call today. Do you have current contact information for Steve Higgins? I presume he is no longer employed by GDC?

Thanks,

Adam T. Schramek | Partner
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From: Klarfeld, Joshua [<mailto:jklarfeld@ulmer.com>]
Sent: Tuesday, April 28, 2015 9:45 AM
To: Schramek, Adam T.
Subject: RE: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Adam,

I am on the call right now with the group. Do you believe there is a need for us to have a separate call? I suspect not, but wanted to make sure you are in accord.

Thanks,

Joshua

Joshua A. Klarfeld
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From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]
Sent: Wednesday, April 22, 2015 1:56 PM
To: Klarfeld, Joshua
Cc: Sarah Kelly (SKelly@nutter.com); Hoffman, Eric; Puig, Yvonne K.; Thomas, Joseph
Subject: Re: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

I will not be at the CMC this month due to a conflict, but can talk that day by phone. Let me know what time works with your travel schedule.

Adam

On Apr 22, 2015, at 12:19 PM, Klarfeld, Joshua <jklarfeld@ulmer.com<<mailto:jklarfeld@ulmer.com>>> wrote:

Adam,

Friday's going to be rough, and then I'm traveling Sunday – Tuesday. I will, however, be at the CMC on Wednesday. Can we catch up either just before or just after the CMC?

Joshua

Joshua A. Klarfeld
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From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]

Sent: Monday, April 20, 2015 8:38 PM

To: Klarfeld, Joshua

Cc: Sarah Kelly (SKelly@nutter.com<<mailto:SKelly@nutter.com>>); Hoffman, Eric; Puig, Yvonne K.; Thomas, Joseph

Subject: Re: NECC - GDC's Discovery Objections, Responses, and Answers to the Saint Thomas Entities' Discovery Requests

Joshua:

I am out of the office until Friday. How about 11 AM or 2 PM?

Adam

On Apr 20, 2015, at 4:15 PM, Klarfeld, Joshua

<jklarfeld@ulmer.com<<mailto:jklarfeld@ulmer.com><<mailto:jklarfeld@ulmer.com>%3c<mailto:jklarfeld@ulmer.com>>>> wrote:

Adam,

We have received your request. I would like to set up a call to discuss possible alternatives to providing a witness for deposition at this time. Please let me know when you are available to discuss.

Joshua

Joshua A. Klarfeld
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From: Schramek, Adam T. [<mailto:adam.schramek@nortonrosefulbright.com>]

Sent: Wednesday, April 15, 2015 6:16 PM

To: Klarfeld, Joshua; Sarah Kelly

(SKelly@nutter.com<<mailto:SKelly@nutter.com><<mailto:SKelly@nutter.com>%3c<mailto:SKelly@nutter.com>>>>
)

Cc: Hoffman, Eric; Puig, Yvonne K.; Thomas, Joseph

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